UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

DC SAFE, SURVIVORS AND ADVOCATES FOR EMPOWERMENT, INC.

Employer

and Case 05-RC-268429

LOCAL 2, OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

On a petition duly filed under Section 9(c) of the National Labor Relations Act ("Act"), a hearing was held on November 23, 2020,[1] before a hearing officer of the National Labor Relations Board ("Board"). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to the undersigned its authority in this proceeding.[2]

DC SAFE, Survivors and Advocates for Empowerment, Inc.[3] ("the Employer") provides services, including shelter, to victims of domestic violence. Local 2, Office and Professional

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[1] All dates are in 2020 unless otherwise indicated.

[2] On the entire record in this proceeding, the undersigned finds:

a) The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

b) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The parties stipulated that DC SAFE, Survivors and Advocates for Empowerment, Inc., a non-profit corporation with an office and place of business in Washington, D.C., is engaged in the business of providing support services to survivors of domestic violence in Washington, D.C. In conducting its operations during the 12-month period ending October 31, 2020, the Employer derived gross revenues in excess of $250,000 and during the same period of time, purchased and received at its Washington, D.C. office and place of business products, goods, and materials valued in excess of $5,000 directly from points outside the District of Columbia.

c) The Petitioner is a labor organization within the meaning of the Act.

d) The Petitioner seeks to represent certain employees of the Employer in the unit described in the instant petition, but the Employer declines to recognize the Petitioner as the collective-bargaining representative of those employees.

e) There is no collective-bargaining agreement covering the employees in the voting group sought by the Petitioner or the unit proposed by the Employer, and the parties do not contend that there is any contract bar to this proceeding.

f) A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[3] Also stylized as DC SAFE (Survivors & Advocates For Empowerment).

Employees International Union, AFL-CIO ("the Petitioner") seeks to represent all the Employer's employees.

I. ISSUES AND POSITIONS OF THE PARTIES

At the hearing, the Employer and the Petitioner stipulated to the following appropriate bargaining unit ("Unit"):

> **Included:** All full-time and regular part-time employees employed by the Employer.
>
> **Excluded:** All confidential employees, managers, guards, and supervisors as defined by the Act.

However, the Employer argues that certain classifications sought by the Petitioner are supervisors, managers, confidential employees, or agents of the Employer and are, therefore, excluded from the Unit. Specifically, the Employer contends workers in the LAP (Lethality Assessment Program) Advocate and On-Call Supervisor classifications are supervisors, managers, and/or agents,[4] while the Grant Program and Development Specialist ("GP&D Specialist") and Administrative Grants Assistant ("AGA") are confidential employees. On the other hand, the Petitioner maintains that any potential supervisory duties lack the independent judgment or accountability necessary for ascribing supervisory status under the Act. Likewise, the Petitioner contends that the alleged confidential employees do not have the labor nexus required to exclude them from the Unit.

The parties agree that approximately 15 employees in various other classifications should be included in any appropriate unit. These are referred to in the record as response line advocates ("RL Advocates"), survivor advocates, survivor advocacy services advocates ("SAS Advocates"), shelter employees, and training and education specialist. There are eight employees in classifications the Employer asserts are excluded pursuant to the parties' stipulated Unit.

II. DECISION

As explained below, based on the record and relevant Board law, I conclude the Employer satisfied its burden to prove the LAP Advocates and On-Call Supervisors are managerial employees, and that the Administrative Grants Assistant is a confidential employee. Accordingly, I conclude that they are excluded from the Unit and ineligible to vote.

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[4] I know of no Board precedent for excluding employees from a collective-bargaining unit based solely on their agency status. The decisions involving unfair labor practice allegations or postelection objections provided by the Employer in support of its argument are inapposite. Similarly, the Petitioner's citation to *Quality Mechanical Insulation, Inc.*, 340 NLRB 798, 802 (2003), an unfair labor practice case, does not apply. Thus, the contention that the agency status of certain petitioned-for employees requires their exclusion, or renders them ineligible to vote, need not be addressed further.

III. THE EMPLOYER'S OPERATION

The Employer is a not-for-profit corporation that provides crisis response and support services to victims of domestic violence. In furtherance of its mission, the Employer operates a crisis response line and a crisis shelter, along with other services, 24 hours a day and 7 days a week ("24/7"), as well as two domestic violence intake centers ("DVICs") on weekdays during normal business hours.

The Employer's day-to-day operations are overseen by Executive Director Ana Natalia Otero, who has held the position for the past 15 years. At least six managers report directly to the Executive Director—the Director of Operations, Development and Communications Director ("Development Director"),[5] Administrative Grants Manager,[6] Training and Education Manager, and Human Resources ("HR") Generalist.[7] The HR Generalist also reports directly to the Director of Operations.

Director of Operations Jennifer Wesberry oversees the Employer's client-facing services, including the RL, DVICs, and shelter. Wesberry's direct reports are the Crisis Response Team ("CRT") Director, Supportive Advocacy Services ("SAS") Director, and Crisis Shelter Director. The Crisis Shelter Director oversees the shelter, known as SAFE Space, and its employees. The Director of Support Advocacy Services oversees the DVICs, including approximately five Support Advocacy Services Advocates.[8] The CRT Director oversees the Employer's 24/7 services, including the crisis response line ("RL") and Lethality Assessment Program ("LAP"), and their employees—approximately four Crisis Response Line Advocates ("RL Advocates"), three LAP Advocates, and three On-Call Supervisors.

One DVIC was located in the Superior Court building in northwest Washington, D.C., and the other was located at the United Medical Center facility in southeast Washington, D.C. at the time of the hearing. The DVICs provide in-person client intake and crisis case management, including referrals to attorneys, government agencies, and other organizations, during normal business hours. The RL functions as a 24/7 telephone line for first responders and others who encounter victims of domestic violence and seek services for survivors. Advocates use the Employer's internal database to record interactions with clients and partner agencies. Calls to the RL are entered into the RL dashboard. As the Employer services between 6,000 and 10,000 clients per year, it uses the LAP to identify those most at-risk and prioritize those individuals for services, including expedited and enhanced services involving other agencies and organizations (e.g., Crime Victims Compensation Program, DC Forensic Nurse Examiners).

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[5] Also referred to in the record as the Director of Development or Development Director.

[6] Also referred to in the record as the Grant/Finance Manager, Finance Grants Manager, and Finance Manager

[7] Also referred to in the record as the Human Resources Director.

[8] Also referred to in the record as SAS Advocates and Survivor Advocates.

According to Executive Director Otero, the Employer receives funding through federal, local, and foundation grants, as well as individual corporate opportunities. The record does not detail the percentage breakdown of the Employer's funding.

A. LAP Advocates

The LAP Advocates[9] rotate through multiple services during their workweek. One LAP Advocate testified that she performs client intake at a DVIC on Tuesdays, works as the DVIC shift supervisor on Wednesdays, and staffs the crisis response line on Thursdays, Fridays, and Saturdays. She also testified that one of the other LAP Advocates supervises on Tuesdays while the other LAP Advocate supervises on Thursdays, and both the other LAP Advocates fill their nonsupervisory days with either client intake or as RL advocates. The CRT Director, Kylie Hogan, stated that LAP Advocates may also work out of the shelter.

Regardless of their assignment for the day, LAP Advocates have primary responsibility for implementing the Employer's lethality assessment program.[10] Advocates assess clients for lethality risk during intake. When a client is identified as a high lethality risk,[11] the LAP Advocate drafts an e-mail for expedited or enhanced services from outside partner agencies using the LAP alert template.[12] The LAP Advocate reviews the draft for completeness and correctness, returning it for any missing information. Once the e-mail is finalized, the LAP Advocate sends it to the partner agencies and monitors the address for any responses. If a partner agency requires follow-up, the LAP Advocate routes it to the appropriate advocate. A LAP Advocate testified that she spends an average of two hours per nonsupervisory workday handling LAP e-mails.

As noted above, each LAP Advocate is assigned as a DVIC shift supervisor one day per week. Hogan testified that, in the shift supervisor capacity, the LAP Advocate reviews incoming clients for intake and then assigns the client based on how many people are waiting for intake and each advocate's workflow. Shift supervisors field questions from other advocates regarding client needs and available services. A LAP Advocate testified that Hogan and the SAS Director maintain a document showing which advocates are available to receive new client intakes but, in her shift supervisor capacity, she keeps track of the influx of new clients and their specific needs and communicates with the on-duty advocates in how they can assist in fulfilling the clients' needs.

Shift supervisors also review and approve expenditures from the Employer's emergency financial assistance fund. Hogan gave several examples, including lock changes, hotel stays, and transportation costs. A LAP Advocate testified that the Employer's 35-page CRT Manual

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[9] Also referred to in the record as LAP Supervisors.

[10] Also referred to in the record as lethality assessment project. The LAP is also incorrectly referred to in the record as the legality assessment program.

[11] The record references a lethality assessment questionnaire, but this document was not introduced as evidence.

[12] The template ensures a consistent format for providing information to the Employer's partner agencies.

contains its protocols for hotel placements, taxis and transportation, and lock changes. She also testified that she does not typically use the CRT Manual because "the practices are pretty repetitive," but she does use it if she cannot answer a question on her own. Both Hogan and a LAP Advocate described several factors, including conflict checks, that are considered when determining whether, and at what level, to approve emergency financial assistance. The LAP Advocate testified that the policy on conflict checks is "a bit unclear" and is done on "a case-by-case basis."

Hogan and a LAP Advocate also testified that LAP Advocates had authority to self-approve emergency financial assistance even when on their nonsupervisory days, although the LAP Advocate stated she typically sought courtesy approval if a shift supervisor was available. However, the LAP Advocate noted that she had self-approved emergency financial assistance when a shift supervisor was not available and has been given "explicit permission" from her director to approve emergency financial assistance on Saturdays for a period of time when she is the only person working and an On-Call Supervisor is on the schedule.

The LAP Advocates receive three to six months' training for the shift supervisor role. There is also an 8-page DVIC Supervision document, described in the record as guidelines for supervisors, which references an Advocate Manual for client intakes. The guidelines also reference a Personnel Manual. However, neither the Advocate Manual nor the Personnel Manual were introduced as evidence.

B. On-Call Supervisors

According to CRT Director Hogan,[13] the core job function for On-Call Supervisors[14] is to provide support and supervision for the crisis response line. On-Call Supervisors work on a three-week rotation—a core week, a secondary week, and a "static" week. During their core week, On-Call Supervisors are the primary point of contact and support for RL Advocates. They monitor the RL dashboard to make sure advocates are able to complete all of their tasks. They approve any emergency financial assistance outside of normal business hours and assist clients in the field with anything from a face-to-face meeting to obtaining emergency temporary restraining orders. On-Call Supervisors meet clients at hotels and shelters to facilitate check-in. On-Call Supervisors also field client complaints about Employer services and services offered by other organizations. Hogan gave the example of clients notifying advocates that orders of protection were not served or persons were not vacated from the premises, and the On-Call Supervisor reaching out to a watch commander for the Metropolitan Police Department ("MPD") for timely resolution.

On their secondary week, the On-Call Supervisor's primary duty is providing supporting coverage and filling in gaps for the crisis response line, covering busy times and scheduled and

[13] No On-Call Supervisors testified at the hearing, and no witness other than Hogan testified in any detail about the duties of the On-Call Supervisor position.

[14] Also referred to in the record as On-Call Advocates and On-Call Supervisory Advocates

unscheduled absences. If the response line is fully staffed, the On-Call Supervisor may pick up a DVIC supervisor shift. In the core and secondary weeks, On-Call Supervisors also monitor the RL dashboard, confirming entries are correct and that follow-up is timely completed. As part of the monitoring, On-Call Supervisors also apprise advocates of new processes, protocols, and programs. Hogan gave the examples of informing RL Advocates of DC Forensic Nurse Examiners ("DCFNE") offering additional services related to domestic violence and ensuring advocates notified clients of those additional services.[15] An example related to the COVID-19 pandemic involved On-Call Supervisors instructing advocates on updated processes for providing clients with food vouchers and getting reimbursement through Crime Victims Compensation ("CVC"), which had previously provided the vouchers directly in-person to clients.

For the static week, Hogan testified that On-Call Supervisors spend one or two days as the DVIC shift supervisor and perform other office-type work, such as client intake, shelter coverage, case follow-up, or general administrative duties, for the remainder of their static time.

When On-Call Supervisors are performing as supervisors, either in the DVICs or outside of normal business hours on the response line or in the field, they have the same authority and duties as LAP Advocates who are DVIC shift supervisors, described above. In addition, during their core week, they are generally the highest-ranking Employer official during nonbusiness hours.[16]

C. Grant Program and Development Specialist

According to Executive Director Otero,[17] the Grant Program and Development Specialist ("GP&D Specialist") and the Development Director are the Employer's development team. Based on the Employer's current resources and upcoming expenses, including new projects, the development team forecasts the Employer's funding needs, and then creates a resource development plan for fulfilling those needs. The development team researches different funding sources and determines which funding opportunities to pursue to balance the Employer's budget. The GP&D Specialist writes grant applications, including coordinating with the financial team for all the necessary attachments, and assists in managing the Employer's grant portfolio, reporting back to the funder how the funds were used, what programmatic goals were accomplished, and what still needs to be accomplished. The GP&D Specialist also creates drafts of the budget.

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[15] The record does not indicate any consequences for advocates who failed to notify clients.

[16] The job description for On-Call Supervisors states they have "independent authority to make decisions about service delivery based on policies provided in the field manual with secondary support available when needed;" however, however, there record contains no details for the field manual and it was not introduced as evidence.

[17] The GP&D Specialist did not testify at the hearing, and no other witness testified about the GP&D Specialist position.

Otero testified that the GP&D Specialist attends finance meetings and operational meetings as needed. The evidence indicates the GP&D Specialist position was not posted until January 2020, and the record does not reveal how many meetings the GD&P Specialist has actually attended.

Otero further testified that the GP&D Specialist does not handle personnel or labor relations matters and the Development Director does not handle personnel or labor relations matters outside of the two-person development team.

D. Administrative Grants Assistant

According to Executive Director Otero,[18] the Administrative Grants Assistant ("AGA") is a direct report of the Administrative Grants Manager ("AGM"), whom the AGA supports along with the Employer's accountant. The AGA works with the AGM to ensure reporting for the Employer's portfolio of grants is accurate in terms of financial expenses and the Employer's internal reporting mechanisms.

The AGA handles the day-to-day back-end financial aspects of the Employer, managing the emergency financial assistance plan and reconciling petty cash, credit cards, the Employer's transportation account (e.g., Uber account). The AGA also assists with the Employer's various budgets, and the AGA is involved in drafting the Employer's budget and presenting it to the Employer's board of directors for approval. When the budget gets broken down into grants, the AGA helps manage the grant portfolio and helps track expenses to show funders that the Employer is keeping within budget.

The AGA helps coordinate the Employer's finance meetings, operations meetings, and the board meeting for the internal affairs committee, which is headed by the treasurer of the board. Specifically, the AGA coordinates with staff and board members to determine each meeting's attendees, prepares the agendas for the meetings, communicates about specific agenda items, takes minutes at the meetings, and is responsible for following up on particular action items (i.e., anything pending from the accountant to the treasurer)—setting calendars, sending around tasks lists, gathering and sharing information with the appropriate people to ensure items are completed. The AGA attends meetings in which the Employer's labor relations policies are discussed and voted on, including such issues as benefit changes and staffing recommendations.

The AGM, who oversees the AGA, functions similar to a comptroller, working directly with the Employer's accountant. The AGM enters information into QuickBooks, processes accounts receivable and accounts payable, and manages the Employer's relationships with financial institutions. The AGM manages the Employer's liabilities (e.g., loans and lines of credit) and expenses on the organizational budgets, and tracks individual grant budgets. Otero estimated the AGM tracks between 8 to 15 different budgets each year. The AGM works with the Director of Operations on program expansion and financial support, particularly tracking and

[18] The AGA did not testify at the hearing, and no other witness testified about the AGA position.

reconciling the emergency financial assistance funds. Regarding the Employer's labor relations, the AGM works directly with the HR Generalist on any benefits, salary increases, and bonuses.

IV. SUPERVISORY STATUS

A. Board Law

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor" while Section 2(11) defines a "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The twelve statutory criteria (or "primary indicia") for supervisory status set forth in Section 2(11) are read in the disjunctive, making possession of any one of the indicia sufficient to establish an individual as a supervisor. Therefore, individuals are statutory supervisors if: 1) they hold the authority to engage in any one of the dozen primary indicia; 2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and 3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-713 (2001); *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994); *Shaw, Inc.*, 350 NLRB 354, 355 (2007). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

In applying this three-part test, the Board continues to follow certain established principles. The burden to prove supervisory authority is on the party asserting it. *Kentucky River*, above at 711-712. Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). Purely conclusory evidence is not sufficient to establish supervisor status. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991). The Board requires evidence the individual actually possesses supervisory authority. *Golden Crest*, above; *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without specific explanation are not enough). Evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104 (2016) (citing *Republican Co.*, 361 NLRB 93, 97 (2014)); *New York University Medical Center,* 324 NLRB 887, 908 (1997), enfd. in relevant part 156 F. Ed 405 (2nd Cir. 1998); *The Door,* 297 NLRB 601 fn. 5 (1990); *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989).

The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact.

The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006); *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994). The authority effectively to recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. See *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1748-1749 (2011); *Children's Farm Home*, 324 NLRB 61 (1997). See also *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 5 (2016); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998).

The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights protected by the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Oakwood Healthcare*, above at 687 (quoting *Chevron Shipping*, above at 381); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). Therefore, it cautions against finding supervisory authority based only on infrequent instances of its existence. *Family Healthcare, Inc*., 354 NLRB 254 (2009); *Golden Crest*, above at 730 fn. 9.

Non-statutory indicia (or "secondary indicia") can be used as background evidence to support a finding of supervisory status but are not dispositive without evidence demonstrating the existence of one of the primary or statutory indications of supervisory status. See *Training School at Vineland*, 332 NLRB 1412, 1412 fn. 3 (2000); *Chrome Deposit Corp.*, 323 NLRB 961, 963 fn. 9 (1997). Compare *K.G. Knitting Mills, Inc.*, 320 NLRB 374 (1995) (finding no primary indicia were present, where individual opened facility in the morning, "watche[d] everything" before the manager arrived, and processed trucks arriving at plant). Four types of secondary indicia commonly mentioned by the Board are the ratio of putative supervisors to employees, differences in terms and conditions of employment, attending management meetings, and how the individual in question is held out to, or perceived by, other employees.

Finally, the sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Shaw, Inc.*, 350 NLRB at 357 fn. 21; *Oakwood Healthcare*, 348 NLRB at 693; *Kanawha Stone Co., Inc.*, 334 NLRB 235, 237 (2001).

B. Application of Board Law to the Facts of This Case

Of the twelve primary indicia for supervisory status, the Employer does not contend (and the record contains no evidence) that LAP Advocates or On-Call Supervisors hire, transfer, suspend, lay off, recall, promote, discharge, reward or adjust employee grievances, or effectively recommend such action, by virtue of their independent judgment. The Employer maintains the LAP Advocates and On-Call Supervisors use independent judgment to discipline and responsibly direct advocates and assign them work. In contrast, the Union contends such actions are governed by detailed instructions in the CRT Manual, and DVIC Supervision document requires the input or approval of higher-level managers, rendering the LAP Advocates and On-Call Supervisors employees under the Act.

1. Assign

The Board defines "assign" as referring "to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare*, 348 NLRB at 689 (2006). Elaborating on this definition, the Board stated that "assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night), or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as 'assign' … However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of" assignment authority. Ibid. In *Oakwood Healthcare*, the Board found charge nurses assigned significant overall duties when they assigned patients to nursing personnel to particular patients. Id. at 695. However, the Board has held that evidence limited to vague or hypothetical testimony that putative supervisors play to employees' strengths does not establish independent judgment. *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111 (2015). Compare *Brusco Tug & Barge Co.*, 359 NLRB 486, 492 (2012), incorporated by reference at 362 NLRB 257 (2015) (independent judgment not shown in absence of detailed specific evidence on putative supervisor selecting one employee over another to perform a particular task). Similarly, assignments based on employee availability do not involve independent judgment. *Springfield Terrace LTD*, 355 NLRB 937, 943 (2010).

In the instant case, the evidence establishes that LAP Advocates and On-Call Supervisors, when acting as DVIC shift supervisors, assign clients to particular employees for intake, where the employees assess clients and offer the clients services from the Employer and other organizations. However, the record fails establish these assignments are made with independent judgment. While CRT Director Hogan testified that the Employer has an "expectation" that shift supervisors consider whether employees have had difficult clients earlier in their shift or need a break, the record does not indicate if or how the Employer checks its expectations are being met. Hogan's testimony also conflicts, as a LAP Advocate testified that she checked employees' availability in a document maintained by two directors.

Hogan also testified that On-Call Supervisors and LAP Advocates monitor the RL dashboard to ensure RL Advocates tasks are timely completed; however, the record contains no details or specific evidence regarding how tasks, including follow-up, are assigned to RL Advocates.

The Employer had the burden of establishing, through sufficient evidence, that the LAP Advocates and On-Call Supervisors have the authority to assign work and this assignment requires the use of independent judgment. I find the record to be insufficient on this point. Accordingly, I find the Employer failed to meet its burden with sufficient evidence that LAP Advocates or On-Call Supervisors assign work using independent judgment within the meaning of Section 2(11) of the Act.

2. Responsible Direction

If a putative supervisor "has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible' … and carried out with independent judgment." *Oakwood Healthcare*, 348 NLRB at 691. Responsible direction means not only being able to take action to ensure tasks are performed correctly by an employee, but also that there is a prospect of material consequences to the alleged supervisor if the directed employees do not perform their tasks correctly. Id at 691-692; *Golden Crest Healthcare Center*, 348 NLRB 727, 731 and fn. 13 (2006). Accountability may be shown by either negative or positive consequences to the putative supervisor's terms and conditions of employment as a result of the putative supervisor's performance in the direction of others. *Golden Crest*, above at 731. See also, *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 4 (2016).

The Employer argues LAP Advocates and On-Call Supervisors responsibly direct employees, particularly during periods where they are shift supervisors. However, the Employer cites to no evidence and I cannot discern any evidence in the record that LAP Advocates or On-Call Supervisors are evaluated on, disciplined for, or rewarded for the performance of any employee other than themselves. As above, the Employer was required to satisfy its evidentiary burden with sufficient evidence that the LAP Advocates and the On-Call Supervisors responsibly direct employees' work, and do so with independent judgment. I consider the record to insufficient to establish that point. Accordingly, I find the Employer has failed to carry its burden of establishing that the LAP Advocates or On-Call Supervisors engage in responsible direction.

3. Evaluate (Promote, Reward, Discipline)

The authority to evaluate is not one of the primary indicia under Section 2(11) of the Act. Even so, the Board analyzes the authority to evaluate to determine whether it is an "effective recommendation" of promotion, reward, or discipline. *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 889 2 (2014) (citing *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)). The Board will find supervisory status if the evaluation leads directly to personnel actions but will not find supervisory status if the evaluation does not, by itself, directly affect other employees' job status. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139-1140 (1999). See also *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997) (evaluations must, by themselves, affect job status); *Passavant Health Center*, 284 NLRB 887, 891 (1987) (authority simply to evaluate without more is insufficient to find supervisory status).

Although the record indicates LAP Advocates and On-Call Supervisors review other advocates' work and may coach or otherwise instruct employees on how to better perform their jobs, there is no evidence that LAP Advocates' or On-Call Supervisors' assessments result in any change to employees' job status. Thus, I find the evidence insufficient to show LAP Advocates or On-Call Supervisors effectively recommend promotion, reward, or discipline through their alleged evaluations.

4. Discipline

To establish the supervisory authority to discipline, asserted disciplinary authority "must lead to personnel action without independent investigation by upper management." *Veolia Transportation*, 363 NLRB No. 98, slip op. at 8 (2016) (citing *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007); *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003)). See also *Lucky Cab Co.*, 360 NLRB 271 (2014) (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)); *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965). The authority to issue verbal reprimands, without more, does not establish the authority to discipline. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Washington Nursing Home, Inc.*, 321 NLRB 366, 371 (1996); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989); *Passavant Health Center*, 284 NLRB 887, 889 (1987). Similarly, "the mere factual reporting of oral reprimands and the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority." Ibid. (citing *Heritage Manor Convalescent Center, Inc.*, 269 NLRB 408, 413 (1984)).[19] Where the evidence is in conflict as to whether a particular type of corrective action constitutes discipline, the Board will find that the party asserting supervisory status has not met its burden. See, for example, *Veolia Transportation*, above, slip op. at 7-8 (conflicting testimony on whether mere issuance of "observation notice," as well as coaching and counseling, constituted discipline). Warnings or counseling forms that bring substandard employee performance to the employer's attention absent a recommendation for future discipline are merely reportorial and thus are not evidence of supervisory authority. Id., slip op. at 7; *Williamette Industries*, 336 NLRB 743, 744 (2001); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). Thus, a warning that simply describes an incident without recommending any disposition is merely reportorial where higher management determines what discipline, if any, is warranted based on the incident. *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000). See also *Shaw, Inc.*, 350 NLRB 354, 356-357 (2007) (record did not establish writeup forms played significant role in disciplinary process).

The Employer asserts LAP Advocates directly address performance issues with other advocates, and then recommend disciplinary action if performance does not approve. A LAP Advocate and CRT Director Hogan both testified that LAP Advocates report poor performance, and Hogan also testified that LAP Advocates make recommendations for additional training. However, there is no evidence that the Employer considers retraining to constitute discipline. The LAP Advocate gave an example of reporting concerns with an employee's attitude, but the record contains no further information. Importantly, in this example, it is not known if the LAP Advocate recommended discipline or if the employee even received discipline. Hogan gave the example of an LAP Advocate reporting an employee's attendance issues and stating the employee needed to be held accountable, which "resulted in a meeting with HR, to kind of formally address and reprimand that person for being late, but also to try to identify what it is

[19] See, for example, *Republican Co.*, 361 NLRB 93, 96-97 (2014); *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998); *Azusa Ranch Market*, 321 NLRB 811, 812-813 (1996); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996).

that's keeping them from showing up on time." The record does not disclose who was at the meeting, if further investigation was conducted, how the employee was reprimanded, or the level of the reprimand. Further, the record does not indicate if the reprimand affected the employee's job status. No disciplinary documents were introduced as evidence.

The Employer contends that it instructs LAP Advocates and On-Call Supervisors to avoid being too friendly with putative subordinates "because that could create an issue when the supervisory positions have to provide assignments, direction, or discipline." However, Hogan testified that a LAP Advocate reported a trainee LAP Advocate "having a very casual relationship" with SAS Advocates. In response, Hogan asked the trainee to be cautious about developing relationships with putative subordinates because it "may affect how they're then able to address issues with them once they took on that supervisory seat as their role." Hogan did not specify any supervisory duties or mention discipline.

Hogan also testified that LAP Advocates and On-Call Supervisors, when performing DVIC supervision, address any issues and provide feedback to advocates in the moment and, if something becomes a trend the shift supervisor "pass[es] it up." However, Hogan did not state whether the shift supervisors recommend discipline or if recommendations are followed.

Based on the above, I find the Employer has not met its burden of establishing that LAP Advocates or On-Call Supervisors have the authority to either issue discipline or effectively recommend discipline. *G4S Regulated Security Solutions*, 362 NLRB 1072, 1072-1073 (2015) ("mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority").

5. Secondary Indicia

Secondary indicia are neutral regarding the supervisory status of LAP Advocates and On-Call Supervisors. On the one hand, the On-Call Supervisors are the highest-ranking representative of the Employer during non-business business hours. However, if all six LAP Advocates and On-Call Supervisors are statutory supervisors, there would be an improbable supervisory ratio of less than two employees for every supervisor.

6. Conclusion Regarding Supervisory Status

Based on the record as a whole, I find the Employer has not met its burden of demonstrating the LAP Advocates and On-Call Supervisors exercise independent judgment in performing any of the Section 2(11) supervisory functions. Specifically, using the standards the Board set forth in *Oakwood Healthcare*, 348 NLRB 686 (2006), I find the record is insufficient to conclude that LAP Advocates and On-Call Supervisors possess authority to "assign" or "responsibly to direct" employees with independent judgment, or that they have the authority to reward or discipline employees, or effectively recommend such action.

V. MANAGERIAL STATUS

A. Board Law

Although the Act makes no specific provision for "managerial employees," under Board policy, this category of personnel has been excluded from the protection of the Act. See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Republican Co.*, 361 NLRB 93 (2014); *Palace Dry Cleaning Corp.*, 75 NLRB 320 (1948). Managerial employees were defined by the Supreme Court in *Yeshiva University* as:

> …those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. … These employees are much higher in the managerial structure than those explicitly mentioned by Congress, which regarded them as so clearly outside the Act that no specific exclusionary provision was thought necessary. … Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management.

Id. at 682-683 (internal quotations and citations omitted).

Although the Board has no firm criteria for determining managerial status, it finds managerial employees as those who formulate and effectuate high-level employer policies or who have discretion in the performance of their jobs independent of their employer's established policy. *Republican Co.*, above at 95-96 (2014) (citing *General Dynamics Corp.*, 213 NLRB 851, 857 (1974)). See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). An employee will not ordinarily be excluded as managerial unless he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. *Allstate Insurance Co*., 332 NLRB 759, 762 (2000).

The party seeking to exclude an individual as managerial bears the burden of proof and the Board has emphasized the need for specific evidence or testimony showing actual—rather than mere paper—authority, particularly the nature and number of decisions or recommendations in a particular decision-making area. *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

B. Application of Board Law to the Facts of This Case

The record indicates both LAP Advocates and On-Call Supervisors decide the level and type of services that are offered to clients and potential clients, including whether services are offered at all. Testimony from CRT Director Hogan and a LAP Advocate indicate myriad factors are considered when LAP Advocates and On-Call Supervisors determine which services are provided via emergency financial assistance, and many decisions are made on an individual case-by-case basis. Although the Employer has protocols for certain expenditures related to emergency financial assistance, the record does not disclose that the LAP Advocates or On-Call Supervisors must operate according to the protocols or are otherwise limited in how emergency financial assistance is provided. Therefore, the evidence shows they exercise unreviewed

discretion to effectively implement employer policy, particularly policies at the heart of the Employer's mission. At root, the LAP Advocates and On-Call Supervisors determine who the Employer serves, how the Employer will serve those at-risk individuals, and whether to financially bind the Employer in providing those services to at-risk individuals. The LAP Advocates and On-Call Supervisors make critical decisions going directly to the core of the Employer's mission and function. As such, I find the record is sufficient to show that these individuals effectuate the Employer's policies by making decisions on behalf of the Employer in mission-critical situations. Compare *Connecticut Humane Society*, 358 NLRB 187, 210 (2012).

Accordingly, I find the Employer has established the LAP Advocates and On-Call Supervisors are managerial employees and are, therefore, excluded from the Unit.

VI. CONFIDENTIAL EMPLOYEE STATUS

A. Board Law

Under Board policy, confidential employees are excluded from any appropriate bargaining unit. The Board has developed two tests for determining whether an employee is confidential. Under the labor-nexus test, the Board defines confidential as those employees who: (1) share a confidential relationship with managers who "formulate, determine, and effectuate management policies in the field of labor relations,"[20] and (2) assist and act in a confidential capacity to such persons. *Waste Management de Puerto Rico*, 339 NLRB 262, 262 fn. 2 (2003) (citing *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189 (1981); *Ford Motor Co.*, 66 NLRB 1317, 1322 (1946)). See also, *Intermountain Electrical Assn.*, 277 NLRB 1, 4 (1985). Stated differently, non-labor-related matters, even though confidential, are "irrelevant to the determination of whether the [employee is] a confidential employee." *NLRB v. Hendricks County*, above at 191. An employee who regularly substitutes for someone has these duties also meets the definition. *Prince Gardner*, 231 NLRB 96, 97 (1977). Compare *Meramec Mining Co*., 134 NLRB 1675, 1678 (1962) (failing to find confidential an employee who sometimes substituted for a confidential but spent "only a fraction of his time in substituting" involved with matters that would make him a confidential); *Swift & Co*., 129 NLRB 1391, 1393 (1961) (same). As an alternative test:

> The Board will also exclude employees who have access to confidential information regarding anticipated changes that may result from collective-bargaining negotiations; however, the Board will not exclude employees who merely have access to personnel or statistical information on which an employer's labor relations policy is based, nor will it exclude employees with access to labor relations information after it has become known to the union or employees concerned.

S. S. Joachim & Anne Residence, 314 NLRB 1191, 1196 (1994) (citing *Pullman, Inc.*, 214 NLRB 762, 762-763 (1974)). See *Case Corp.*, 304 NLRB 939 (1991); see also *Crest Mark*

[20] "Formulate, determine, and effectuate" are assessed in the conjunctive. *Weyerhaeuser Corp.*, 173 NLRB 1170, 1172 (1968).

Packing Co., 283 NLRB 999, 999 (1987); *Fairfax Family Fund, Inc.*, 195 NLRB 306, 307 (1972). The Supreme Court approved of both the labor-nexus test and the alternative test in *NLRB v. Hendricks County*, above at 188-189 (1981).

An employee's access to personnel records and the fact that the employee can bring information to the attention of management, which may ultimately lead to disciplinary action by management, is not enough to qualify an employee as confidential. *Ladish Co.*, 178 NLRB 90 (1969). See also *Lincoln Park Nursing Home*, 318 NLRB 1160, 1164 (1995); *Hampton Roads Maritime Assn*., 178 NLRB 263, 264 (1969); *RCA Communications, Inc.*, 154 NLRB 34, 37 (1965). Employees who handle material dealing only with the financial matters of the employer are not confidential. *Dinkler-St. Charles Hotel, Inc.*, 124 NLRB 1302, 1304 (1959); *Brodart, Inc*., 257 NLRB 380, 384 fn. 10 (1981). Similarly, the fact that some employees may be entrusted with business information to be withheld from their employer's competitors or that their work may affect employees' pay scales does not render such employees either confidential or managerial. *Swift & Co*., 119 NLRB 1556, 1565 (1958). Merely having access to confidential labor relations information is not sufficient to exclude an individual from a unit absent the clear demonstration of a confidential relationship with a person who formulates, determines, and effectuates the employer's labor relations policy. It is the confidentiality of such a relationship, not the confidentiality of information, that is determinative. See, for example, *Greyhound Lines, Inc.*, 257 NLRB 477, 480 (1981) and cases cited therein.

The party asserting confidential status has the burden of providing evidence to support its assertion. *Intermountain Electric Assn.*, above at 4 (1985).

B. Application of Board Law

1. Grant Program and Development Specialist

While the record indicates the GP&D Specialist has access to financial information and other confidential information, the evidence does not establish a labor nexus. His supervisor, the Development Director, does not work with the HR Generalist and is not involved in the development of labor relations policy. The record fails to show that the GP&D Specialist has access to confidential information directly related to the formulation of the Employer's labor relations policies or assists or acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. *Associated Day Care Service of Metropolitan Boston*, 269 NLRB 178 (1984). For example, in *Bakersfield Californian*, 316 NLRB 1211, 1211-1212 (1995), the Board did not find the secretary to the retail advertising manager to be confidential even though she processed "various documents including payroll information, change of status forms, disciplinary actions for unit members, and hiring information," had access to departmental staffing needs and employees' projected salaries, and was involved in the departmental budget process. Despite her manager appearing to formulate, determine, and effectuate labor relations policy, the evidence failed to show the secretary assisted the manager with respect in that confidential capacity.

Accordingly, I find the Employer has not met its burden under the labor-nexus test or the alternative test to show the GP&D Specialist is a confidential employee.

2. Administrative Grants Assistant

Unlike the GP&D Specialist, the record shows the AGA attends meetings where labor relations policy is recommended, discussed, and adopted. Her direct supervisor, the AGM, works with the HR Generalist on employee benefits, salary increases, and bonuses. Similar to the secretary for the classified advertising manager in *Bakersfield Californian*, which the Board found to be a confidential employee, the AGA has access to information that, if prematurely disclosed to the union, would prejudice the Employer's bargaining strategy. Id. at 1213 (citing *Pullman, Inc.*, 214 NLRB 762 (1974).

Accordingly, I find the Employer has satisfied the alternative test for establishing the AGA is a confidential employee and excluded from the Unit.

VII. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I find the LAP Advocate and On-Call Supervisors are excluded from the Unit as managers, and the Administrative Grants Assistant is excluded as a confidential employee. I direct an election in the following unit:

Included: All full-time and regular part-time employees employed by the Employer.

Excluded: All confidential employees, managers, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 2, Office and Professional Employees International Union, AFL-CIO.

A. Election Details

The election will be conducted by United States mail.[21] The mail ballots will be mailed to employees employed in the appropriate collective bargaining unit. Accordingly, on **Thursday, January 7, 2021, at 3:00 p.m.,** ballots will be mailed to voters by National Labor Relations Board, Region 05, from its office at 100 S. Charles Street, Bank of America Center, Tower II, Suite 600, Baltimore, Maryland 21201.

[21] The parties stipulated to the appropriateness of a mail ballot election.

Voters must sign the outside of the envelope in which the ballot is returned. Any ballots received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Thursday, January 14, 2021**, should communicate immediately with the National Labor Relations Board by either calling the Region 05 Office at (410) 962-2822 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be comingled and counted at the Baltimore Regional Office on **Thursday, January 28, 2021**, **at 3:00 p.m.** In order to be valid and counted, the returned ballots must be received in the Baltimore Regional Office prior to the counting of the ballots. Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities, I further direct that the ballot count will take place virtually, on a videoconference platform (such as WebEx, Skype, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **December 22, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **January 5, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Baltimore, Maryland this 31st day of December, 2020.

(SEAL)

/s/ Sean R. Marshall

Sean R. Marshall, Regional Director
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